# No. 12,089

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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JAMES E. EVERETT,
*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),
*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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## Subject Index

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### (A) EVIDENCE UNDISPUTED SHOWS PLAINTIFF WAS INJURED ON JULY 14, 1947.

Appellee, in its points and authorities has not met the issues presented in appellant's opening brief. There were two questions presented by the appellant, the first, was the plaintiff injured, and second, did the plaintiff receive his injury as the result of a fall from a locomotive due to a defective hand railing. In appellant's opening brief the issues have been confused. The evidence is without conflict that plaintiff was injured. The only real dispute in the evidence has to do with the extent of that injury and whether or not he should have returned to work by the tme the case was tried. The evidence introduced by plaintiff and

defendant without dispute was that plaintiff sustained a rather severe injury to his low back and coccyx. The defendant introduced into evidence the hospital record of the Southern Pacific Hospital in San Francisco which was marked "Defendant's Exhibit F." (T. R. p. 84.) That record shows that when plaintiff was admitted to the hospital in San Francisco an examination made by the attending physicians revealed (1) Acute distress with diffuse tenderness all over the back (2) Tenderness of coccyx with pain on motion, (3) Spasm of back muscles and limitation of motion, (4) Lumbar and sacral spine very tender in the middle line to palpation, (5) Movements of extremities, abduction, adduction and flexion of thighs upon pelvis limited due to pain of lower back, (6) Touch sensation and prick with a pin diminished on inside of left leg, (7) Diagnosis coccydynia, (T. R. pages 86, 87 and 89). There is no dispute in the record that these injuries kept the plaintiff confined to the Southern Pacific General Hospital in San Francisco from four days after the date of the accident until August 11, 1947. At that time, at the request of plaintiff, he was discharged to return to work.

> "On August 11, 1947, his symptoms had entirely subsided and at his own request he was discharged with return to duty date for August 18, 1947." (T. R. page 88.)

The plaintiff then returned to Santa Barbara and before going to work reported to Dr. Stephens in Santa Barbara to be examined and released to work,

but Dr. Stephens did not release him and signed a form paper stating that he was unable to say when Mr. Everett could return to work, (T. R. page 105). Certainly, up to this point at least plaintiff was the one to initiate his release from the hospital to return to work, showing that he had every desire to return to his employment. After receiving this slip from Dr. Stephens, he received further treatment both in Santa Barbara and at the Southern Pacific General Hospital in San Francisco until he was given a release to return to work on February 9, 1948. Mr. Everett did attempt to work on that date and was only able to work for a period of about four hours, and at the end of that time because of the engine vibration, bouncing up and down and turning from one side to the other, he was forced to stop, (T. R. pages 40 and 41). Certainly plaintiff Mr. Everett made every effort to return to his employment up to this time. All of the foregoing evidence is without dispute. It is evidence produced by the defendant, and it clearly shows an injury to the plaintiff which was disabling from the time of the accident until February, 1948.

The introduction of the question of intoxication was highly prejudicial, as was stated by the trial court when the defendant failed to connect it up with testimony showing its materiality. Defendant knew at all times that plaintiff could do all of the things that the motion pictures showed him to be doing. The only thing that the motion picture showed was plaintiff taking his small child for an airing in a push

cart which push cart also contained a bundle of groceries. During the course of the picture, which was approximately two minutes in length, the plaintiff adjusted the child and also lifted the bag of groceries. In his deposition, taken just the day before the trial, plaintiff testified that he was able to lift objects of from twelve to fifteen pounds in weight, (T. R. page 111). Also when defendants announced in open court what the moving picture showed, plaintiff stated that it was never contended that Mr. Everett could not do the things the picture was represented to show.

"Mr. Freeman. Q. Did you observe him (plaintiff) moving and bending and lifting?

A. I did.

Mr. Brobst. No. We have never contended he couldn't do these things."

(T. R. page 94.)

"Q. Now, Mr. Everett, as far as taking the baby out in this little Taylor Tot, I guess it is. Do you do that regularly?

A. I do it every day, every morning unless it is raining.

Q. As a matter of fact, in your deposition that was taken the other day—

Mr. Freeman. I thing that is entirely incompetent, irrelevant and immaterial. Are you impeaching your own witness?

Mr. Brobst. No.

Mr. Freeman. The witness is right here in the courtroom. You can ask him anything you want, but you can't read the deposition except for impeachment.

Mr. Brobst. Well, your deposition was taken, wasn't it, just the day before this trial?

A. Yes.

Q. And you lifted objects, bent over and lifted objects, but not in excess, I believe you told them—

Mr. Freeman. I object as very leading, your Honor. He is capable of testifying.

The Court. Yes, sustained.

Mr. Brobst. Q. Well, did you lift objects, Mr. Everett?

A. Yes.

Q. Approximately how heavy?

A. Oh, 12 or 15 pounds.

Q. And what was the weight of your baby?

A. At that time she was between 14 and 15 pounds.

Q. And I believe that is what you testified to in your deposition?

A. Yes."

(T. R. pages 110 and 111.)

This testimony clearly shows that defendant was fully aware that plaintiff never contended that he could not lift and pick up objects. Plaintiff did testify that in performing these movements it bothered him, but that is all.

"Q. What kind of lifting or anything could you do?

A. None.

Q. What kind of activity could you indulge in?

A. I would walk eight or ten blocks a day.

Q. In other words, you were in continual pain? How about bending around and so on, did that pain you?

A. Yes, it bothered me."

(T. R. page 64.)

The purpose of setting forth this testimony is to show that the only purpose for displaying the motion picture was to get before the jury the fact that plaintiff might have been intoxicated or was addicted to the use of intoxicating liquor, thereby creating a prejudice against him. When plaintiff on direct examination attempted to establish the fact that he had taken his small child for a walk and did lift the small child, this testimony was blocked by the defendant.

"Mr. Brobst. Q. Mr. Everett, you are a married man, are you?

A. Yes.

Q. And you have one small child?

A. Yes.

Mr. Freeman. That is immaterial.

The Court. Sustained."

(T. R. page 68.)

One other point should be borne in mind and that is that it was not bending and lifting that prevented plaintiff from returning to work, but it was the vibration and bouncing of the engine that caused him pain and prevented him from continuing as a fireman.

"Q. And what was the date that you attempted to go to work, Mr. Everett?

A. February 9, 1948.

Q. And what type of job did you attempt to do?

A. Firing a switch engine in the Santa Barbara yards.

Q. And what happened to you?

A. I had to be relieved after four hours.

Q. And why did you have to be relieved after four hours?

A. Well, the pain from the tip of my coccyx down my legs, and then I couldn't sit down any longer.

* * * * * * *

Q. What is it that causes you to have that pain when you sit in one of these engines?

A. Vibration, bouncing up and down, and turning from one side to the other."

(T. R. pages 40 and 41.)

With this evidence in the record, first, that plaintiff never contended that he could not lift objects from twelve to fifteen pounds in weight and, second, that it was not bending and lifting that prevented him from working but it was the vibration of the engine, then there could be no other purpose for bringing intoxication into the case than to inflame the jury as pointed out in appellant's opening brief.

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**(B) EVIDENCE ALSO WITHOUT DISPUTE—PLAINTIFF WAS INJURED AS RESULT OF A DEFECTIVE ENGINE HANDRAIL.**

There is absolutely no conflict in the evidence of even the slightest as to how the accident happened. As pointed out in appellant's opening brief, the plaintiff testified that after he had finished placing the engine marker on his engine and was descending therefrom, the handrail pulled out, and he was caused to fall. The defendant offered into evidence the hospital record which contains a description of the accident identical with what was testified to by the plaintiff.

" '12/2/47, injured July 14, 1947, fell 8 feet off an engine landing on buttocks, was in this

hospital one month, then seen by local M.D.'s in Santa Barbara and L. A. Diagnosis coccydynia, present complaint, pain on tip of coccyx while sitting relieved by being up, dull aching both legs from hips down all the time, a tingling,' I guess, 'not aggravated by coughing. Examination showed tenderness on tip of coccyx on external palpation. Legs equal in diameter.' "
(T. R. page 89.)

" 'The patient states that on July 14, 1947, at about 10:35 a.m. at Santa Barbara, California Yards, while on duty in the front of Engine No. 1823, the hand rails came loose and he lost his balance and fell to the ground, a distance of about eight feet, landing on his feet, and bent backward.' "
(T. R. page 87.)

There is no other evidence in the record as to how the accident happened, and therefore, no evidence upon which a verdict could have been found, based on the evidence in favor of the defendant. The only possible way that the jury could have arrived at a verdict in favor of the defendant was by reason of being prejudiced against plaintiff because of the inferences created by the questions dealing with intoxication and use of intoxicating liquors.

It is respectfully submitted that the judgment should be reversed.

Dated, Oakland, California,
June 22, 1949.

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